No. 90-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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This brief *amicus curiae* of the Chamber of Commerce of the United States of America (the "Chamber") is filed with the consent of the parties pursuant to Rule 37.3 of the Rules of this Court.

STATEMENT OF INTEREST

The Chamber's membership is composed of 180,000 companies and several thousand other organizations ranging from state and local chambers of commerce to trade and professional organizations. As the largest association of business and professional organizations in the United States, the Chamber serves as the principal voice of the American business community, regularly

representing the interests of its member employers in important labor relations matters affecting those interests before this Court, the lower courts, the United States Congress, the Executive Branch and the National Labor Relations Board. Such representation is an integral aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance these interests by filing briefs in a wide spectrum of labor relations litigation.[1]

The instant case raises a significant question the resolution of which will have a profound impact on the statutory bargaining rights of the Chamber's employer members: whether a collective bargaining agreement's arbitration clause, which is a delegation by the employer of its statutory right to bargain, survives the contract's termination as to all matters that were arbitrable during the term of the contract.

In *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977), this Court held that a severance pay provision over which the union sought arbitration remained arbitrable even after the expiration of the collective bargaining agreement. *Nolde* created a limited presumption in favor of post-expiration arbitrability based on the peculiar facts of that case. The aftermath of *Nolde* has been a tale of divided circuit courts of appeal, a division leaving employers uncertain as to whether the expiration date specified in a collective bargaining agreement has any effect at all with respect to the agreement's arbitration clause. On one end of the spectrum of lower court decisions is the Ninth Circuit's opinion in the instant case, which holds that if a dispute would have been arbitrable during

[1] E.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542 (1990); *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988); *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985).

the term of the contract, *Nolde* renders it arbitrable after the contract's expiration. On the other end of the spectrum are decisions which construe *Nolde* more narrowly, holding that a dispute is not presumptively arbitrable under *Nolde* after contract expiration unless it involves a right or benefit that accrues during the term of the contract and ripens after its expiration.[2]

The instant case invites this Court to revisit and clarify *Nolde* in a manner consistent with the normal and reasonable expectations of contracting employers. The filing of this brief will enable the Court to examine the perspective of employers who, as a collective group, are adversely affected by the Ninth Circuit Court of Appeals' misapplication of *Nolde*. That misapplication results in a judicially implied waiver by employers of their statutory right to bargain over grievances after a contract's termination. The waiver of such a fundamental bargaining right should not be presumed or implied, but, as with other statutory rights, should be deemed waived only when the waiver is "clear and unmistakable."[3]

SUMMARY OF ARGUMENT

In *Nolde*, this Court held that a severance pay dispute which arose after the expiration of a collective bargaining agreement remained arbitrable notwithstanding the contract's expiration. In holding that such a dispute was presumptively arbitrable even after expiration of the collective bargaining agreement, the Court took care to note the union's argument that the severance pay amounted to *deferred* compensation, compensation to which an em-

[2] *See, e.g., United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022, 1024-25 (10th Cir. 1990); *Chauffeurs, Teamsters and Helpers, Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400, 1403 (8th Cir.) (*en banc*), *cert. denied*, 479 U.S. 1007 (1986).

[3] *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

ployee may remain entitled even after the expiration of the collective bargaining agreement. The *Nolde* Court, then, expressly ordered post-expiration arbitration based on the union's insistence that the severance pay at issue was deferred compensation.

In contrast to *Nolde*'s narrow holding, the court below in the case at bar held that a post-expiration dispute is arbitrable if it would have been arbitrable during the term of the contract. The Ninth Circuit's unduly expansive reading of *Nolde* is contrary to the intent of the Court in *Nolde* because it contravenes well-established principles that arbitration is consensual. The lower court's blanket application of *Nolde* to all post-expiration disputes automatically nullifies the employer's post-expiration right to bargain without any requirement that the waiver of such a fundamental statutory right be clear and unmistakable. A correlative inconsistency is that a union is not presumed to have waived its post-expiration statutory right to strike, despite the fact that a no-strike obligation is the presumptive *quid pro quo* for an agreement to arbitrate.

These bargaining inequities and their resultant harm to the collective bargaining process were not intended by the Court in *Nolde*. Accordingly, *Nolde* should be clarified in a manner that is consistent with the employer's statutory right to bargain. The presumption should apply only to accrued or deferred compensation because such benefits are earned during the term of the contract and will often ripen or become payable as an entitlement after the contract's expiration. As to other types of post-expiration disputes, such as the seniority provision at issue here, an employer should be deemed to have waived its post-expiration statutory right to bargain only if such waiver is clear and unmistakable. The record in the present case clearly demonstrates that petitioner made no such waiver.

BACKGROUND

Petitioner Litton Financial Printing Division ("Litton") was party to a collective bargaining agreement with Printing Specialties District Council Number 2 ("the union"). By its terms, the contract expired on October 5, 1979. Some eleven months subsequent to that date, Litton discharged ten employees as a result of its decision to shut down a particular "cold-type" operation at its Santa Clara, California plant. The discharged employees worked solely or primarily in the discontinued operation. No collective bargaining agreement was in effect at the time of these layoffs. The union filed grievances alleging that the layoffs violated a provision of the expired contract which provided that "in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." (J. App. at 30).

The question presented to the National Labor Relations Board ("the Board") was whether the seniority provision at issue survived the expiration of the parties' last collective bargaining agreement under the Supreme Court's holding in *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977). In *Nolde*, the Supreme Court held that a severance pay dispute occurring after expiration of the collective bargaining agreement remained arbitrable in the absence of an explicit manifestation by the parties that the arbitration clause was not to survive the termination of the contract. In so holding, the Court created a presumption in favor of the arbitrability of disputes "arising under" an expired contract.

The Board applied its holding in *Indiana & Michigan Elec. Co.*, 284 NLRB 53, 60 (1987), to the instant case. In *Indiana & Michigan*, the Board held that "a dispute based on postexpiration events 'arises under' the contract within the meaning of *Nolde* only if it concerns contract rights capable of accruing or vesting to some degree dur-

ing the life of the contract and ripening or remaining enforceable after the contract expires." Applying this formulation to the disputed seniority provision, the Board held that the dispute concerning the provision was not arbitrable post-expiration because "[t]he right to layoff by seniority if other factors such as ability and experience are equal is not 'a right worked for or accumulated over time.'" *Litton Financial Printing Division, A Division of Litton Business Sys., Inc.*, 286 NLRB 817, 821 (1987).

Purporting to apply the Board's *Indiana & Michigan* standard, but in fact applying a much broader interpretation of *Nolde*, the United States Court of Appeals for the Ninth Circuit reversed the Board's determination. *NLRB v. Litton Financial Printing Division, A Divison of Litton Business Sys., Inc.*, 893 F.2d 1128 (9th Cir. 1990).

I. *NOLDE*'S PRESUMPTION IN FAVOR OF ARBITRABILITY IS BEST UNDERSTOOD AND MOST PRACTICABLE WHEN LIMITED TO THE FACTS OF THAT CASE.

A. The Court Below Expanded *Nolde*'s Holding Beyond What The *Nolde* Court Intended.

There are longstanding precepts of collective bargaining on which employers continue to rely in negotiating agreements but that are threatened by the Ninth Circuit's expansive holding in the instant case. Principal among these collective bargaining precepts is that arbitration is consensual. An employer has a statutory duty, and right, to bargain over grievances both during the term of a collective bargaining agreement and, as in the instant case, after the contract has expired.[4] The duty to bargain,

[4] Section 8(a)(5) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(5), deems it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." Section 8(d) of the Act,

however, is distinct from a duty to arbitrate. Arbitration is the consensual delegation to a third party by the employer of its statutory right to bargain over grievances. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); *Hilton-Davis Chem. Co.*, 185 NLRB 241, 242 (1970) ("The mutual commitment of contract parties to consider interstitial disputes through a grievance procedure and, failing agreement, to submit them to binding arbitration is a voluntary surrender of the right of final decision which Congress has reserved to these parties."). The National Labor Relations Act imposes no duty on an employer to agree to arbitrate. *See* 29 U.S.C. § 158(d) (obligation to meet and confer regarding terms and conditions of employment "does not compel either party to agree to a proposal or require making a concession"). Indeed, the employer's delegation of its statutory right to bargain over grievances is considered so valuable and beneficial to the union that courts will imply as *quid pro quo* for such delegation a no-strike obligation on the part of the union. *See Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962).[5] Thus, any waiver by the employer of

29 U.S.C. § 158(d), delineates the basic bargaining rights and duties of employers and unions:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

[5] *See also Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 247-48 (1970); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 381-82 (1974).

its valuable bargaining right by delegation of such right to a third-party arbitrator—like the waiver of other statutory rights—must be "clear and unmistakable." *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

This Court in *Nolde*, 430 U.S. 243, was not unaware of these longstanding principles when it held that union members' claims for severance pay were arbitrable notwithstanding the fact that such claims arose after the expiration of the collective bargaining agreement. *See id.* at 252. Nor is it reasonable to assume that the *Nolde* Court was engaging in the impermissible act of construing one statutory provision—29 U.S.C. § 173(d)[6]—in a manner which renders the employer's statutory bargaining right nugatory.[7]

Rather, *Nolde*'s holding must be read in the context of the limiting facts of that case, and when so read, is not inconsistent with the employer's statutory right to bargain. While *Nolde* is undeniably in need of clarification, the rule announced by the Court in *Nolde* is a reasonable one when limited to factually similar cases—i.e., disputes arising over benefits that vest or accrue during the term of the contract, arguably amounting to deferred compensation.[8]

[6] Section 173(d) provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an *existing* collective-bargaining agreement." (Emphasis supplied.)

[7] *Cf. Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

[8] There are, of course, some post-expiration disputes whose triggering events occur during the term of the contract but for which arbitration proceedings do not begin until after the contract's termination. As to these situations, the *Nolde* Court stated, "[I]t could not seriously be contended . . . that the expiration of the contract would terminate the parties' contractual obligation to resolve such a dispute in an arbitral, rather than a judicial forum." 430 U.S. at 251. *See also Glover Bottled Gas Corp. v. Local Union No. 282, Int'l Brotherhood of Teamsters*, 711 F.2d 479, 481 (2d Cir. 1983) (Friendly, J.) (theft implicating employees and notice by employer of its intent to dismiss employees for refusal to take polygraph tests all occurred during contract term; held: although employees' discharges occurred after expiration of the contract, *Nolde* mandated arbitration based on "just cause" provisions of the expired contract since the basic dispute arose before the contract's termination).

The dispute in *Nolde* involved severance pay, which the union in that case contended was in the nature of *deferred* compensation, like vacation pay or pension benefits. The union argued that the severance wages over which it sought post-contract expiration arbitration were a vested entitlement that was payable only upon termination of employment. 430 U.S. at 248. Given this, the union maintained, the fact that an employee's termination occurs after the expiration of the contract which conferred the benefit is immaterial. In short, money earned was money due.

This Court saw no reason why parties could not agree to the delayed receipt of a contract entitlement, severance pay, which in accordance with the union's argument, "was nothing more than deferred compensation." *Id.* at 248-49 n.4. The Court's recitation of the union's arguments and the factual context in *Nolde* was not gratuitous. The Court ordered post-expiration arbitration based "on this record"—the record established by the union and employer. *Id.* at 255. It is thus unreasonable to interpret *Nolde* as holding that all post-expiration grievances are arbitrable to the same extent as pre-expiration grievances. That is, however, precisely what the Ninth Circuit did in the case at bar.

B. The Court Below Failed To Heed The Limiting Facts Upon Which *Nolde* Was Decided.

From the standpoint of the employer, the problem with the Ninth Circuit's application of *Nolde* in the instant case is that the court divorced *Nolde*'s holding from its

facts, creating an ambush-like presumption that marries the employer to the arbitration clause of an expired contract no matter what the nature of the post-expiration dispute. In *Indiana & Michigan Elec. Co.*, 284 NLRB 53 (1987), however, the Board fashioned a more reasonable rule to determine whether a particular grievance brought after the expiration of a contract was arbitrable under *Nolde*. Consistent with *Nolde*, the Board held that parties are bound to arbitrate post-expiration disputes only if (1) such disputes are over rights arising under the expired contract and (2) the contract lacks language sufficient to negate the presumption favoring post-expiration arbitration of the latter disputes. *Id.* at 60. "[A] dispute based on postexpiration events 'arises under' the contract within the meaning of *Nolde* only if it concerns contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Id.*

Purporting to apply the *Indiana & Michigan* standard, the Ninth Circuit inexplicably held in the instant case that the "seniority" at issue arose under the expired contract. However, the seniority dispute in this case plainly does not "arise under" the expired contract within the meaning and intent of *Nolde*. The Ninth Circuit appears to have viewed seniority in its denotative sense, concluding that because seniority is a status that, like age, continues to increase during the term of the contract, it fits within the formulation of *Indiana & Michigan*. Seniority, however, is not itself a vested benefit; it is merely an age-like condition which, absent contractual language to the contrary, is devoid of import beyond the life of a collective bargaining agreement. *See United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022, 1026 (10th Cir. 1990) ("'Seniority is not only born from the collective bargaining agreement; it does not exist apart from that contract.'") (citation omitted). Although the disputed right in the instant case involved seniority, the right itself (seniority protection against layoffs) was not a vested benefit.

The contract merely provided that "[i]t is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." (J. App. at 30). Unlike the severance pay or arguable deferred compensation involved in *Nolde*, this right was not something that was worked for and in which an employee could therefore claim a continuing property interest.

Any other construction of the disputed provision would make the term seniority a talisman for the invocation of post-expiration arbitration. Seniority is implicated in many contractual matters, such as order of layoffs and preferences in promotions.[9] Because seniority is a ubiquitous concept, the Ninth Circuit's approach would mean that the mere invocation of the term through artful pleading would ensure arbitrability. This result stretches the *Indiana & Michigan* test and its genesis, *Nolde*, beyond recognition. It also extends the valuable right to arbitrate grievances well beyond the reasonable and fair expectation of contracting employers.

Accordingly, though it purported to do so, the court below did not defer to the Board's construction of Litton's statutory duty to bargain. *See NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990) (Board rule entitled to deference as long as it is rational and consistent with the Act).[10]

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[9] Importantly, in referring the severance pay dispute to arbitration, the Court in *Nolde* focused on the union's deferred compensation argument, not the seniority which simply determined the amount of severance pay. *See* 430 U.S. at 246, 249. The *Nolde* Court ordered arbitration because the severance pay was arguably in the nature of accrued deferred compensation, not because severance pay was calculated on the basis of seniority.

[10] The court of appeals found that the Board had inconsistently applied its "arising under" standard and cited two Board decisions involving post-contract expiration seniority disputes that purportedly diverged from the Board's decision in the instant case.

C. The Ninth Circuit Instead Applied Its Own Overbroad Interpretation Of *Nolde*, Thereby Making Virtually All Contractual Matters Arbitrable After A Contract's Expiration.

Rather than follow the Board's *Indiana & Michigan* test for determining when a grievance "arises under" an expired contract, the court below admittedly "construed much more expansively the *Nolde* presumption of arbitrability of post-expiration grievances . . . ." *NLRB v. Litton Financial Printing Division*, 893 F.2d at 1138. The court specifically relied on language in *Nolde* that "'where the dispute *is over a provision of the expired agreement*, the presumptions favoring arbitrability must be negated expressly or by clear implication.'" *Id.* (quoting *Nolde*, 430 U.S. at 255) (emphasis added by circuit court). Removing the language of *Nolde* from its factual context, the Court held, in effect, that a post-expiration grievance is arbitrable merely if it is related to a provision of the expired contract that was arbitrable during the contract's term.[11]

See UPPCO, Inc., 288 NLRB 937 (1988) and *United Chrome Products, Inc.*, 288 NLRB 1176 (1988). In *United Chrome Products*, however, the Board specifically distinguished *Litton*, 288 NLRB at 1177, and in *UPPCO*, the Board found that the specific *language* of the parties' contract brought the post-expiration grievance within *Nolde*'s holding, 288 NLRB at 940.

In any event, any perceived inconsistencies between the latter decisions and the Board's decision in the instant case are insufficient grounds on which to refuse to defer to the Board's judgment. Certainly the Board cannot be accused of "'gloss[ing] over or swerv[ing] from prior precedents without discussion.'" *Cf. Curtin Matheson*, 110 S. Ct. at 1556 n.2 (Blackmun, J., dissenting) (citations omitted). Even if the Board at times has strayed from the true meaning and intent of *Nolde*, that is no basis for perpetuating the misapplication, let alone, as the court did here, to expand the misapplication.

[11] The court below also found that other Ninth Circuit precedent was consistent with its interpretation of *Nolde*. *See, e.g., Local Joint Executive Bd. of Las Vegas, Culinary Workers Union, Local*

In holding as it did, the court below followed the tack of other courts which have construed *Nolde* more broadly than warranted. *See, e.g., Seafarers Int'l Union v. National Marine Servs.*, 820 F.2d 148, 154 (5th Cir.), *cert. denied*, 484 U.S. 953 (1987) ("The scope of the rule articulated by the Supreme Court in *Nolde* is broad: disputes grounded on a collective bargaining agreement containing an arbitration clause are arbitrable even after expiration of the agreement unless the arbitration clause states otherwise."); *Federated Metals Corp. v. United Steelworkers*, 648 F.2d 856, 861-62 (3d Cir.), *cert. denied*, 454 U.S. 1031 (1981) (Where dispute turns on differing interpretations of the expired agreement, the dispute arises under the expired contract and the duty to arbitrate survives.).

The broad holdings of these cases leave open the possibility that even "just cause" termination clauses would automatically remain arbitrable for post-expiration terminations. *Cf. Chauffeurs, Teamsters and Helpers, Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400, 1403 (8th

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226 v. Royal Center, Inc., 796 F.2d 1159 (9th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). *Royal Center*, as interpreted by the court below, applied the following test to determine the survivability of an arbitration clause: "whether [in light of the parties' original intent] a particular type of grievance would have been arbitrable if circumstances unanticipated by the parties when the agreement was drafted had not arisen." 893 F.2d at 1138. In addition to begging the question presented by the instant case, the latter inquiry is not germane because the expiration of a contract is virtually always anticipated by the parties. Thus, unlike *Royal Center*, "[w]e do not have before us the unusual situation in which unanticipated events have caused the termination of the collective bargaining agreement and ordering arbitration is the only way to preserve the parties' original intent." *Gold Star*, 897 F.2d at 1025 n.2 (also distinguishing *Royal Center*). In any event, to the extent that *Royal Center* and other Ninth Circuit precedent hold that all post-expiration disputes that would have been arbitrable during the term of a contract are also arbitrable after the contract's termination, those cases, like the instant case, are fundamentally flawed.

Cir.) (*en banc*), *cert. denied*, 479 U.S. 1007 (1986) (rejecting this argument by limiting the *Nolde* presumption to rights "which to some degree have vested or accrued during the life of the contract and merely ripened after termination"). Indeed, under the approach of the Ninth, Third and Fifth Circuits, *all* matters arbitrable during the term of the contract are arbitrable after the contract's expiration. It is inconceivable that this Court intended this type of indiscriminate application of the *Nolde* presumption.

II. INDISCRIMINATE APPLICATION OF THE *NOLDE* PRESUMPTION DEROGATES FROM THE EMPLOYER'S STATUTORY RIGHT TO BARGAIN EVEN THOUGH THE EMPLOYER HAS NOT CLEARLY AND UNMISTAKABLY WAIVED THIS RIGHT.

A. *Nolde* Is Not *AT&T Technologies*.

As is evident, the Ninth Circuit's broad interpretation of *Nolde*'s presumption favoring post-expiration arbitrability is indistinguishable from the arbitrability determination which courts make during the term of the contract. When construing an effective contract, "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense of '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 650 (1986) (citation omitted). As in *AT&T Technologies*, no distinction is drawn in the instant case between the types of disputes—the presumption is applied wholesale. It is thus difficult to ascertain where *AT&T Technologies* ends and *Nolde* begins. If the Supreme Court intended that the continuum between these two cases be seamless, then the union's and employer's rights must be the same whether the claim of arbitrability arises during the term of the

contract or after its expiration. However, such is not the case.

1. Indiscriminate Application of *Nolde* Creates Bargaining Disparities Which Are Harmful to the Bargaining Process.

AT&T Technologies recognizes that "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" 475 U.S. at 648 (citation omitted). This principle derives from the fact that arbitration is a voluntary waiver of the parties' statutory right to bargain under Section 8 of the Act. *Hilton-Davis Chem. Co.*, 185 NLRB 241, 242 (1970). "Absent mutual consent, the parties revert to the statutory scheme of 'free' collective bargaining, wherein each party must attempt in good faith to reach agreement, but is under no statutory mandate to reach agreement or to forfeit its right to utilize its economic power if no agreement can be achieved." *Id.* This Court has held that a waiver of a statutorily protected bargaining right must be "clear and unmistakable." *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

Yet applying the *Nolde* presumption to *all* post-expiration disputes that would have been arbitrable during the term of the contract effectuates a silent waiver by the employer of its statutory right to bargain. Not only is this waiver achieved in contravention of the "clear and unmistakable" standard, the waiver is also illogical in the absence of a concomitant waiver by the union of its right to strike. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957) (no-strike clause is the *quid pro quo* for an agreement to arbitrate grievances).

Courts have recognized that "[i]f the arbitration clause survives termination under *Nolde* and the coterminous no-strike clause does not, the employer remains bound to arbitrate, although it is deprived, in part at least, of the consideration flowing to it from its agree-

ment to arbitrate, *i.e.* the no-strike clause." *See United Steelworkers v. Fort Pitt Steel Casting Division—Conval-Penn, Inc.*, 635 F.2d 1071, 1076 (3d Cir. 1980), *cert. denied*, 451 U.S. 985 (1981) (footnote omitted). Accordingly, the duty to arbitrate post-expiration exists only if and to the extent that the union's no-strike obligation survives. *Goya Foods, Inc.*, 238 NLRB 1465, 1467 (1978) ("[I]t would indeed be anomalous if an employer who would be contractually bound to arbitrate a certain dispute after contract expiration could still be subjected to economic pressure that would be protected."). Because the union's waiver of its statutory right to strike "during the life of the collective-bargaining agreement is not a 'clear and unmistakable' waiver . . . of the right to strike beyond the contract term," *see Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986) (citation omitted), an employer's agreement to arbitrate during the term of a contract is likewise not a clear and unmistakable waiver of its statutory right to bargain beyond the contract term. Any other result would unfairly and disproportionately derogate from the employer's statutory right.[12]

2. An Overbroad Application of *Nolde* Creates Other Disruptive Disparities in Addition to the Employer's Loss of *Quid Pro Quo* for Agreeing to Arbitrate.

A broadly construed *Nolde* presumption also unfairly benefits the union and interferes with the dynamics of the collective bargaining process in other ways that are related

[12] Ironically, in rejecting Litton's argument that the *union* waived its right to bargain over the effects of Litton's shutting down its "cold-type" operations, the court below recognized that "a contractual waiver of the right to bargain about a mandatory subject of bargaining must be . . . *clear and unmistakable*." *NLRB v. Litton Financial Printing Division*, 893 F.2d at 1135 n.6 (emphasis added). It is perplexing that the court applied this standard to the union's statutory bargaining right but not to the employer's vis-a-vis the post-expiration arbitration issue.

to the employer's loss of *quid pro quo* for its agreement to arbitrate. In the case at bar, the original contract provided, in addition to an "expiration date", that "the stipulations set forth shall be in effect for the time hereinafter specified." (J. App. at 22). *Nolde* should not be interpreted to render contract expiration clauses nugatory as to all arbitrable matters. While such would be a boon for the union, this disregard of unambiguous contractual language places the employer in an untenable position of uncertainty and powerlessness. The employer cannot be certain about the effectiveness of the contract's expiration date, but the union can sit smugly knowing that arbitration will be available in most instances.

Moreover, blanket application of the *Nolde* presumption to all post-expiration contractual disputes actually *defeats* the national policy favoring arbitration of labor conflicts. An employer who knows that an agreement to arbitrate during the term of the contract can be spawned into a self-perpetuating waiver of the employer's statutory right to bargain will have less incentive to agree to arbitration to begin with.

A further problem inherent in an overly broad application of the *Nolde* presumption is that a union has less incentive to bargain in light of the added assurance that the arbitration clause lives on. This is especially so, where, as implied by the court below, the arbitration obligation survives indefinitely. In the instant case, the grievances claimed to be arbitrable did not even arise until nearly eleven months after the expiration of the contract. In *Nolde*, however, only four days separated the expiration of the contract and the filing of the grievances. The *Nolde* Court cautioned that it expressed no opinion "as to the arbitrability of post-termination contractual claims which . . . are not asserted within a reasonable time after the contract's expiration." 430 U.S. at 255 n.8. If the union in the instant case were allowed to arbitrate its grievances some eleven months after the

contract's expiration, this result would effectively " 'impose a self-perpetuating system of arbitration in place of normal collective bargaining.' " *Fort Pitt Steel*, 635 F.2d at 1079 n.5 (citation omitted).

B. The Circuit Court's Misapplication Of The *Nolde* Presumption Accomplished Indirectly What The Union Sought To Do Directly—To Apply The "Unilateral Change Doctrine" To An Arbitration Clause.

The union in the case at bar argued below that Litton's refusal to arbitrate constituted a unilateral change in a term or condition of employment before an impasse had been reached and thus violated the doctrine of *NLRB v. Katz*, 369 U.S. 736 (1962). Under *Katz*, unless an employer first bargains to impasse, it commits an unfair labor practice by unilaterally changing the terms and conditions of employment after the expiration of a collective bargaining agreement. *See id.* at 736. *Katz*, however, left unmodified the union's right to exert economic pressure on the employer after expiration of the contract. *See id.* at 741 n.7, 747 (citing *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960)).[13] The terms

[13] In *Insurance Agents*, union workers participated in a work "slow down" after expiration of their collective bargaining with Prudential Insurance, the employer. The Board ruled that the union's exertion of economic pressure on the employer during negotiations for a new contract constituted a refusal to bargain in good faith in violation of Section 8(b)(3) of the Act. This Court disagreed with the Board's construction of the union's 8(b)(3) duty to bargain, holding that the Board's branding of the union's economic activity against its employer as violative of Section 8(b)(3) amounted to a usurpation by the Board of the union's right use of economic weapons to achieve substantive resolution of its differences with the employer. 361 U.S. at 488-89. In so holding, the Court observed that "[t]he Board freely (and we think correctly) conceded here that a 'total' strike called by the union would not have subjected it to sanctions under § 8(b)(3), *at least if it were called after the old contract, with its no-strike clause, had expired.*" *Id.* at 491 (emphasis added).

As the *Katz* Court expressly disclaimed any inconsistency between its decision and *Insurance Agents*, it is clear that even under

which *Katz* envisioned could not be unilaterally changed prior to impasse were not terms like arbitration that go to the heart of the employer's right to bargain rather than delegate decision-making to a third party arbitrator. Were the holding of *Katz* otherwise, courts would then be compelled to imply a no-strike obligation as presumptive *quid pro quo* for the employer's agreement to arbitrate. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 247-48 (1970); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 381-82 (1974).

Because it concluded that the Board erred in applying *Indiana & Michigan*, the court of appeals in the instant case found it unnecessary to address the union's *Katz* argument. Yet, by holding that the arbitration clause in this case survived the contract's expiration, the court reached the same result as would have been achieved had it adopted the union's erroneous reading of *Katz* as a free-standing opinion, divorced from other precedents which, taken as a whole, hold that an obligation to arbitrate is presumptively coterminous with the union's no-strike commitment. *Lucas Flour*, 369 U.S. at 104-05; *Boys Markets*, 398 U.S. at 247-48; *Gateway Coal*, 414 U.S. at 381-82.

As the Board stated in *Hilton-Davis*, and reaffirmed in the instant case, "arbitration is a voluntary surrender of the right of final decision which Congress has reserved to [the bargaining] parties." 185 NLRB at 242. Nothing in Section 8(d) compels surrender of this right. *See id.* Yet the union's view and the Ninth Circuit's holding effectively compel surrender merely because an employer voluntarily surrendered its right during the term of the contract. Indirectly, the union has been granted its wildest fantasy of applying *Katz* to an arbitration

Katz a union's waiver of its right to strike does not extend beyond the term of the contract.

clause without incurring a continuing no-strike obligation. But if the unilateral change doctrine does not countenance such an outcome, *Nolde* certainly should not be interpreted so broadly as to achieve the same forbidden result.

III. *NOLDE* SHOULD BE CLARIFIED IN A MANNER THAT RENDERS ITS PRESUMPTION CONSISTENT WITH THE EMPLOYER'S STATUTORY RIGHT TO BARGAIN.

The *Nolde* presumption should be limited to post-expiration disputes involving accrued benefits that are in the nature of deferred compensation. Such a limitation distinguishes *Nolde*'s presumption from that of *AT&T Technologies* on the basis of the type of contract right that is grieved post-expiration. Were the *Nolde* presumption applied to all post-expiration disputes that are arguably related to a provision of an expired agreement, employers would unintentionally waive their statutory bargaining rights, notwithstanding the existence of an explicit contract expiration date and even though the union is seemingly free to exploit the contract's expiration by exerting economic pressure on employers. This undesirable consequence is avoided by interpreting *Nolde* in light of its limiting facts and restricting the *Nolde* presumption to post-expiration disputes involving deferred compensation rights.

Because rights to accrued or deferred compensation are particularly susceptible to ripening after the expiration of the contract, *Nolde*'s limited presumption favoring post-expiration arbitrability is not unduly destructive of the parties' bargaining expectations or the employer's right to bargain. It is one thing to imply a limited delegation of the employer's post-expiration statutory rights to allow arbitration of disputes involving employee benefits that vested during the term of the contract and which arguably became payable after the contract's expiration. This is a reasonable reading of *Nolde*. It is quite another

matter, however, to imply a wholesale waiver of the fundamental statutory right to bargain as to any matter that was arbitrable during the term of the contract. That is what the court below did in the instant case.

Although *Nolde* is properly applied to post-expiration disputes over benefits in the nature of deferred compensation, the prevailing standard for waiver of the statutory right to bargain as to other kinds of post-expiration disputes, such as the seniority provision at issue here, should not differ from the waiver standard required during the term of a contract: a party's waiver of its statutory right to bargain should be "clear and unmistakable." An expired contract merely containing a provision relevant to a post-expiration dispute hardly amounts to that kind of waiver. This overly broad and mechanical application of *Nolde* would defeat this Court's command that the adequacy of a waiver must be determined by the "specific circumstances of each case." *See Metropolitan Edison*, 460 U.S. at 709. Thus, for the sake of making the *Nolde* presumption consistent with the employer's statutory right to bargain and this Court's precedents on waiver of that right, *Nolde* should be applied only in limited circumstances involving deferred compensaiton or benefits that accrue or vest during the term of the contract which cannot be eliminated or divested simply by expiration of the contract.

Under the Ninth Circuit's approach, contract expiration dates cease to be meaningful. Moreover, employers are disadvantaged by the inability to use their economic powers to bargain, while unions do not seem to incur a similar disadvantage. Finally, arbitration clauses have an indefinite, self-perpetuating duration. Other cases offer a more reasoned approach. In *United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990), the union, like the union in the instant case, argued that despite expiration of the collective bargaining agreement, the contract's seniority provisions lived on. The Tenth Circuit rejected this con-

tention, holding that "'[s]eniority is not only born from the collective bargaining agreement; it does not exist apart from that contract.'" *Id.* at 1026 (citation omitted).

In so concluding, the court in *Gold Star* followed the view of the Eighth Circuit that the *Nolde* presumption is to apply only to post-expiration disputes arising under the expired contract and that "to 'arise under' the expired contract, a dispute 'must either involve rights which to some degree have vested or accrued during the life of the contract and merely ripened after termination, or relate to events which have occurred at least in part while the agreement was still in effect.'" *Id.* at 1024-25 (quoting *Chauffeurs, Teamsters and Helpers, Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400, 1403 (8th Cir.) (*en banc*), *cert. denied*, 479 U.S. 1007 (1986)). The *Gold Star* court observed "that the Eighth Circuit's interpretation of *Nolde Brothers* strikes the proper balance between . . . two important principles of labor law . . .: the idea that 'the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so,' and the 'well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements.'" *Id.* at 1025-26 (citations omitted).

The instant case requires that this Court balance the same strong, co-existing policies of federal labor law as did the Tenth and Eighth Circuits. This task, however, should be less an assay of first impression than a reaffirmation of *Nolde* in light of the facts on which that case was decided. Contrary to the Ninth Circuit's approach in the instant case, the question is not whether a dispute "arises under" an expired contract in the sense that had it arisen during the term of the contract, it would have been arbitrable. This reading of *Nolde* would allow an expired contract's arbitration provision to continue in

perpetuity, elevating the union's statutory bargaining rights above the employer's. There must be a more precise guidepost as to when a dispute is arbitrable post-expiration, and the most reasonable guidepost is the one logically inferred from the facts on which *Nolde* was decided—disputes involving benefits that are in the nature of deferred compensation.

CONCLUSION

For all the foregoing reasons, the Ninth Circuit's decision rejecting the Board's determination that the seniority at issue in the present case was not arbitrable under *Nolde* should be reversed.

Respectfully submitted,

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